A **LAU POH LEE v. DATO DR KAMALASOTHY KANDIAH & ORS**

HIGH COURT MALAYA, IPOH
SM KOMATHY JC
[JUDICAL REVIEW APPLICATION NO: 25-6-02-2015]
24 JUNE 2015

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PROVIDENT FUND: *Withdrawal of fund – Application for – Applicant claimed to be physically incapacitated from being further employed – Medical examination by three medical practitioners appointed by Employees Provident Fund Board (EPF Board) – Findings that applicant physically or mentally fit to engage in employment* C *– Application for withdrawal rejected – Failure to notify applicant regarding rejection of application – Whether EPF Board acted ultra vires its powers in requiring applicant be examined by three medical practitioners – Whether EPF Board acted contrary to mandatory requirements imposed by EPF Rules*

D ***ADMINISTRATIVE LAW:*** *Certiorari – Application for – EPF Board dismissed applicant's application to withdraw funds – Application to quash decision of EPF Board – Applicant claimed to be physically incapacitated from being further employed – Medical examination by three medical practitioners appointed by EPF Board – Application for withdrawal – Findings that applicant physically or mentally fit to engage in employment rejected – Failure to notify applicant regarding* E *rejection of application – Whether EPF Board acted ultra vires its powers in requiring applicant be examined by three medical practitioners – Whether there was procedural unfairness on account of EPF Board's failure to notify applicant in writing that his application was rejected – Whether EPF Board acted contrary to mandatory requirements imposed by EPF Rules*

F The applicant was a member of the employees provident fund established under the Employees Provident Fund Act 1991 ('the Act'). The applicant submitted a form to the third respondent, Employees Provident Fund Board ('EPF Board') to withdraw the entire amount in his EPF account pursuant to s. 54(1)(c) of the Act on the ground that the applicant was physically G incapacitated from being further employed. The applicant submitted a medical report by one Koh Chan Seng ('Koh') a consultant physician and cardiologist, to the EPF Board together with his application, certifying that the applicant was suffering from an enlarged liver, ischemic heart disease, liver cirrhosis and diabetes mellitus. The EPF Board wrote to the applicant H requesting him to undergo a medical examination by three medical practitioners, all of whom constituted the Medical Board. The medical practitioners submitted their findings and recommendations to the EPF Board *vide* Form EPF 9A ('Form 9A') which certified their unanimous findings that although the applicant was diagnosed with the said conditions, I he was not physically or mentally incapacitated from engaging in an employment. Thus, the EPF Board rejected the application for withdrawal. The applicant then submitted a written appeal to the EPF Board to review its decision. The EPF Board found no reason to disagree with the finding and

recommendations submitted by the Medical Board and expressly stated that the appeal was rejected as the applicant did not fulfil the requirements of s. 54(1)(c) of the Act. This was the impugned decision which the applicant sought to challenge in the current. The applicant challenged the decision of the EPF Board in rejecting his application on the ground that (i) there was non-compliance with r. 41(3) of the Employees Provident Fund Rules 1991 ('EPF Rules') as the EPF Board had appointed three doctors to examine him; and (ii) that he was not informed in writing of the rejection of his claim in breach of the rules of natural justice.

Held (dismissing application):

(1) Pursuant to r. 41(3) of the EPF Rules, the applicant needed to be examined by only two doctors. Rule 41(4) of the EPF Rules stipulates that a third medical practitioner is to be appointed only in the case where the two medical practitioners under sub-r. (3) differ in their opinion as to whether an applicant met the criteria set out in s. 54(1)(c) of the Act. In the instant case, there was no explanation as to why the applicant was examined by three medical practitioners when the law provides for the examination to be done by two. The medical opinion expressed by the three medical practitioners appointed by the EPF Board was in variance with the view expressed by the applicant's specialist. In this regard, it was critical to note that r. 41(5) of the EPF Rules states that the contents of Form 9A shall be evidence of the facts stated therein for the purpose of withdrawal under s. 54(1)(c) of the Act. In light of this provision, the fact that the applicant was examined by three medical practitioners did not render the decision made by the EPF Board null and void. The applicant had not in any way been prejudiced by the fact that three medical practitioners had examined him. The procedural unfairness complaint raised by the applicant failed. (paras 21 & 22)

(2) The applicant had in fact, pursuant to r. 41(6) of the EPF Rules, apply to the EPF Board to review its earlier decision to reject his withdrawal application. The failure of the EPF Board to notify him in writing that his application was rejected as mandated by r. 41(6) of the EPF Rules had not deprived the applicant the right to pursue an appeal against the dismissal of his appeal. As he was not deprived of his right to appeal as provided in sub-r. 6, there was no merit in his claim that there had been procedural unfairness. Having exercised his right of appeal, there was no basis for his complaint that the non-compliance with the requirement in r. 41(6) of the EPF Rules made the rejection of his appeal procedurally unfair. Thus, the application for an order of *certiorari* to quash the decision of the EPF Board in rejecting his claim to withdraw the monies in his EPF account was dismissed. (paras 23 & 24)

Case(s) referred to:

Council of Civil Service Unions And Others v. Minister for the Civil Service [1984] 3 All ER 935 ***(refd)***

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC ***(refd)***

Majlis Perbandaran Subang Jaya v. Laguna De Bay Sdn Bhd [2015] 1 CLJ 357 CA ***(refd)***

Minister of Labour & The Government of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(refd)***

Legislation referred to:

Employees Provident Fund Act 1991, ss. 54(1)(c), 58(2)

Employees Provident Fund Rules 1991, r. 41(2), (3), (4), (5), (6)

Rules of Court 2012, O. 53 r. (3)(6)

For the applicant - Ranjit Singh; M/s Ranjit Singh & Co

For the respondent - Karlos Israphil; M/s Amin Karlos

Reported by Suhainah Wahiduddin

JUDGMENT

SM Komathy JC:

Introduction

[1] The applicant is a member of the Fund established under the Employees Provident Fund Act 1991 ("Act").

[2] On 6 August 2014, the applicant submitted a form to the third respondent, Employees Provident Fund Board ("EPF Board"), to withdraw the entire amount in his EPF account. The application for withdrawal was made pursuant to s. 54(1)(c) of the Act on the ground that the applicant was physically incapacitated from being further employed. The applicant stated that he needed the money to undergo a liver transplant surgery.

[3] The applicant submitted a medical report dated 4 August 2014 by one Dr Koh Chan Seng, a consultant physician and cardiologist at Perak Community Specialists Hospital Ipoh, Perak, to the EPF Board together with his application. Dr Koh Chan Seng certified that the applicant was physically incapacitated from being further employed as he was suffering from an enlarged liver, ischemic heart disease, liver cirrhosis and diabetes mellitus.

[4] Two days later namely, on 6 August 2014 the EPF Board wrote to the applicant requesting him to undergo a medical examination by its medical board scheduled for 20 August 2014 at the Raja Permaisuri Bainun Hospital. He underwent the medical examination on the scheduled date. He was examined by three medical practitioners at the hospital namely, Dato' Dr Raja Lope Ahmad bin Raja Ariffin, Dato' Dr Kamalasothy a/p Kandiah and Dr Zairul Anuar, all of whom constituted the medical board.

[5] After the medical examination of the applicant was completed, the medical practitioners submitted their findings and recommendations to the EPF Board *vide* Form EPF 9A dated 20 August 2014 ('Form 9A'). The medical practitioners certified their unanimous findings that although the applicant was diagnosed with 'ischemic heart disease' and 'liver cirrhosis', he was not physically or mentally incapacitated from engaging in an employment.

[6] Relying on the medical board's unanimous findings and recommendations in Form 9A, the EPF Board rejected the application for withdrawal. The applicant then submitted a written appeal to the EPF Board *vide* letter dated 15 September 2014 to review its decision. His appeal was deliberated and rejected at the management meeting convened on 16 October 2014. The EPF Board found no reason to disagree with the findings and recommendations submitted by the medical board *vide* Form 9A that the applicant's physical and mental conditions did not incapacitate him from engaging in employment.

[7] The EPF Board's letter dated 18 November 2014, expressly stated that the appeal was rejected as the applicant did not fulfil the requirements of s. 54(1)(c) of the Act. This is the impugned decision which the applicant seeks to challenge in these proceedings.

[8] On 20 May 2015, the applicant sought leave to commence judicial review proceedings against all the respondents cited in the application, but succeeded only in respect of the EPF Board. He sought the following orders;

(a) An order to quash the decision of the EPF Board dated 16 October 2014;

(b) An order of *mandamus* to compel the EPF Board to pay the sum of RM833,310.09 being the total amount standing to the credit of the applicant's EPF account; and

(c) An order of *mandamus* to compel EPF Board to pay additional compensation of RM5,000 pursuant to s. 58(2) read with Sixth Schedule of the Act.

Grounds For Challenging Decision

[9] The applicant challenges the decision of the EPF Board to reject his application on the ground that there was procedural unfairness in arriving at the said decision. First, there was non compliance with r. 41(3) of the EPF Rules, as the EPF Board appointed three doctors to examine him; and, secondly, that he was not informed in writing of the rejection of his claim in breach of the rules of natural justice.

The Statutory Provisions

[10] Section 54(1) of the Act is of crucial importance in this claim, and for convenience I reproduce the provision in full:

A The Board may authorise the withdrawal of all sums of money standing to the credit of a member of the Fund upon any terms and conditions as may be prescribed by the Board if the Board is satisfied that:

(a) the member of the Fund has died;

(b) (Deleted by Act A1300);

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(c) the member of the Fund is physically or mentally incapacitated from engaging in an employment; or

(d) (Deleted by Act A1123);

(e) the member of the Fund is not a Malaysian citizen and is about to

C leave

(emphasis added)

[11] The procedure for applying for withdrawal of monies under s. 54(1)(c) of the Act on the ground that the member is either physically or mentally

D incapable of being further employed is set out under r. 41(2) to (6) of the Employees Provident Fund Rules 1991("EPF Rules"). For convenience, I set out the relevant provision:

Rule 41. Evidence required in support of notification for withdrawal.

(1) ...

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(2) where the notice of withdrawal is made on the ground that the member is no longer physically or mentally capable of being, and is not likely to be again reemployed, the member or the applicant shall forward Form EPF 9 (HK) or EPF 9 (HL) as the case may be to the Board together with a medical certification from any medical

F practitioner certifying that the member is either physically or mentally incapable of being further employed.

(3) Upon receipt of the Form EPF 9 (HK) or EPF 9 (HL) as the case may be and the medical certification as provided under subrule (2), the Board shall forward Form EPF 9A to any two of the medical practitioners appointed by the Board, or to any other medical

G practitioners for the time being approved by the Board, *in lieu* of the medical practitioners appointed by the Board, who shall examine the member and submit to the Board its findings and recommendations by completing and returning the Form EPF 9A to the Board.

(4) where the opinion of the two medical practitioners under subrule (3)

H differ, the Board shall forward Form EPF 9A to a third medical practitioner appointed by the Board who shall also examine the member of the Fund and submit to the Board its findings and recommendations by completing and returning the Form EPF 9A to the Board.

I (5) the Form EPF 9A submitted to the Board pursuant to subrules (3) and (4) as the case may be, shall be evidence of the facts stated therein for the purposes of withdrawal under section 54(1)(c) of the Act

(6) where the medical practitioners referred to under subrules (3) and (4) have, upon examining a member of the Fund intending to withdraw under section 54(1)(c) of the Act, certify that such member is able to continue to work in any employment, such member being dissatisfied with such certification, may, not later than thirty days of the date of a written notification issued and addressed to him by the Board, apply in writing to the Board to review such certification stating the grounds relating to his state of health and his ability or inability to do or perform any work in any employment, and any decision thereon made by the Board shall be final.

The Parties' Contentions

[12] The main thrust of the submission of Mr Ranjit Singh, counsel for the applicant was that the decision was flawed as it was not permissible for the EPF Board to act contrary to the mandatory requirement imposed by r. 41(3) of the EPF Rules. The rule provided that the applicant was to be examined by two medical practitioners to determine whether he was able or otherwise to continue to work in any employment. The EPF Board acted *ultra vires* its powers by requiring the applicant to be examined by three doctors instead of the two doctors prescribed by r. 41(3). The fact that three medical practitioners had examined the applicant, it was argued, rendered the decision of the EPF Board null and void.

[13] It was further argued that the decision of the EPF Board was flawed in another aspect. This argument was based on the failure of the EPF Board to notify him in writing that his application was rejected. This constituted a breach of natural justice and vitiated the said decision.

[14] In response, Mr Amin Karlos disputed the argument that the decision of the EPF Board was null and void by reason of the fact that the applicant was examined by three medical practitioners. It was said that there was no prejudice suffered by the applicant as a result of this fact. On the second point, he conceded that the applicant was not notified in writing of the rejection of his application at the first instance, but contended that as the rejection was verbally communicated to the applicant, there was no procedural unfairness as the applicant did exercise his right to appeal against the decision of the EPF Board in rejecting his appeal.

The Applicable Principles

[15] The power of the High Court to grant judicial review is provided under the Specific Relief Act 1950 and the Courts of Judicature Act 1964. The subject matter of every judicial review is a decision made by some person (or body of persons) or else a refusal by him to make a decision. Judicial review is now regulated by O. 53 of the Rules of Court 2012 which provides the means by which judicial control of administrative action is exercised. As judicial review relates to the exercise of power by statutory bodies which may affect large numbers of people, the law requires that applications for

judicial review are dealt with as expeditiously as possible. Order 53 r. (3)(6) of the Rules of Court 2012 requires that applications are made promptly, and in any event within three months of the time when the grounds first arose or when the decision is first communicated to the applicant.

[16] The applicable principles relating to judicial review are set out in the judgment of the Supreme Court in *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159:

> It seems to us that it should be treated as trite law that judicial review is not an appeal from a decision but a review of the manner in which the decision was made and the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable. There is no dearth of authorities on this proposition.....
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> The often quoted case of *Chief Constable of the North Wales Police v. Evans* [1982] 3 All ER 141 is also relevant on this subject. We think it is in order to quote the *dictum* of Lord Hailsham of St Marylebone LC and Lord Brightman to bring home the point. At pp 143-144, Lord Hailsham LC said:
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> > … It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner ...
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> > But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law. There are passages in the judgment of Lord Denning MR (and perhaps in the other judgments of the Court of Appeal) in the instant case and quoted by my noble and learned friend which might be read as giving the courts *carte blanche* to review the decision of the authority on the basis of what the courts themselves consider fair and reasonable on the merits. I am not sure whether Lord Denning MR really intended his remarks to be construed in such a way as to permit the court to examine, as for instance in the present case, the reasoning of the subordinate authority with a view to submitting its own opinion. If so, I do not think this is a correct statement of principle. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court.

[17] In *Minister of Labour & The Government of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195, the Supreme Court held:

> A general guideline on the functions of the court before interfering in the exercise of an executive discretion can be found in the judgment of Lord Greene MR in the celebrated case of *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223. The courts can only interfere with an act of executive authority if it be shown that the authority has contravened the law. Secondly, the court is not a court of appeal in such matters. Thirdly, the exercise of such discretion is governed by certain principles and so long as the exercise is within the four corners of these principles, the discretion is absolute and cannot be questioned in a court of law. Lord Greene elaborated on those principles and they are that the exercise of the discretion must be a real exercise of the discretion and that the authority exercising the discretion must consider matters required to be considered and disregard irrelevant collateral matters. If the authority fails to observe these principles, the exercise of discretion cannot be said to be 'reasonable'. Lord Greene then summed up his guideline as follows:
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> The minister's discretion under s 20(3) is wide but not unlimited. As stated earlier, so long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court unless he had mis-directed himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute. Otherwise he had a complete discretion to refuse to refer a complaint which is clearly frivolous or vexatious which in our view this is one.

[18] The grounds on which an administrative act or decision can be called into question by judicial review are well-established and fall under the three main heads of illegality, irrationality and procedural impropriety. For this proposition I refer to the well known exposition of principle given by Lord Diplock in *Council of Civil Service Unions And Others v. Minister for the Civil Service* [1984] 3 All ER 935:

> My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

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By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. […] By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury
B unreasonableness" […]. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. […] I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be
C affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

D **[19]** In *Majlis Perbandaran Subang Jaya v. Laguna De Bay Sdn Bhd* [2015] 1 CLJ 357; 2 MLJ 509, the Court of Appeal gave judicial approval to the three heads laid down by Lord Diplock as permissible grounds for judicial review.

[20] Two points are clear from the authorities on the subject. First, the purpose of judicial review is not to review the merits of the decision in which
E the application for judicial review is made but to deal with the abuse of power in the broadest sense, ie, whether a decision was made in accordance with the law; whether when a decision was made material considerations were taken into account and immaterial considerations disregarded and whether the reasoning is adequate. The second point is that it is highly
F unlikely that permission will be given to apply for judicial review if an alternative remedy was or is available to the applicant.

Discussion

[21] I turn now to deal with the contention that the EPF Board had acted
G *ultra vires* its powers in requiring the applicant to be examined by three medical practitioners. It is true that pursuant to r. 41(3) of the EPF Rules, the applicant needs to be examined by only two doctors. Rule 41(4) stipulates that a third medical practitioner is to be appointed only in the case where the two medical practitioners under sub-r. (3) differ in their opinion as to whether an applicant met the criteria set out in s. 54(1)(c). In the instant case,
H there is no explanation as to why the applicant was examined by three medical practitioners when the law provides for the examination to be done by two.

[22] The medical opinion expressed by the three medical practitioners appointed by the EPF Board is in variance with the view expressed by the
I applicant's specialist. In this regard, it is critical to note that r. 41(5) states that the contents of Form 9A shall be evidence of the facts stated therein for the purpose of withdrawal under s. 54(1)(c) of the Act. In the light of this

provision, I am unable to agree with Mr Ranjit Singh that the fact the applicant was examined by three medical practitioners renders the decision made by the EPF Board null and void. The applicant has not in any way been prejudiced by the fact that three medical practitioners had examined him. In the result, I find that the procedural unfairness complaint raised by the applicant fails.

[23] The next question to be resolved is whether there was procedural unfairness on account of the failure of the EPF Board to notify him in writing that his application was rejected as mandated by r. 41(6) of the EPF Rules. The applicant contended that the omission constituted a breach of natural justice which vitiates the decision to reject his appeal. I would have been prepared to countenance this argument if the omission had deprived the applicant the right to pursue an appeal against the dismissal of his appeal. It is imperative to bear in mind that the applicant in the present case, did in fact pursuant to r. 41(6) of the EPF Rules apply to the EPF Board to review its earlier decision to reject his withdrawal application. As he was not deprived of his right to appeal as provided in sub-r. 6, I see no merit in his claim there has been procedural unfairness. Having exercised his right of appeal, there is no basis for his complaint that the non compliance with the requirement in r. 41(6) made the rejection of his appeal procedurally unfair.

Conclusion

[24] In the result, the application for an order of *certiorari* to quash the decision of the EPF Board in rejecting his claim to withdraw the monies in his EPF account is dismissed with costs of RM3,000.